(3)

No. 95-2002

Supreme Court, U.S.
FILED
SEP 11 1996
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1995

Jodie Timothy Packer, Petitioner

v.

United States of America

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SECOND SUPPLEMENTAL PETITION FOR WRIT OF CERTIORARI

Jodie Timothy Packer
Pro-Se

Jodie Timothy Packer
Federal Medical Center
Houston, Unit 21605-077
3150 Horton Road
Fort Worth, TX 76119-5996

14 pp

In this, Petitioner's Second Supplemental Petition for Writ of Certiorari, Petitioner asserts that the district court was without jurisdiction to accept his guilty pleas to the two (2) counts of structuring and the two (2) counts of mail fraud, because the indictments (Appendix) upon which the guilty pleas were based were constitutionally defective. The indictments did not include all of the essential elements of the offenses which the government had to prove and Petitioner was prejudiced because the indictments did not apprise him of what conduct constituted a crime or adequately give him notice of what charge he must be prepared to defend.

Petitioner did not present this issue to the Court in his original or supplemental petitions because he is proceeding pro se and has only now realized this issue's existence. Petitioner believes he is allowed to raise this issue for the first time in a petition for writ of certiorari. "An objection to the indictment based on a failure to charge an offense can be made at any time." F.R.Cr.P. 12(b)(2); ***U.S. v. Fitzgerald***, 89 F.3d 218, 221 (5th Fir. 1996). Nor was Petitioner's guilty plea a bar to challenge a jurisdictional defect. "The entry of a guilty plea does not act as a waiver of jurisdictional defects such as an indictment's failure to charge an offense." ***U.S. v. Meacham***, 626 F.2d 503, 510 (5th Cir. 19180); citing ***Menna v. New York***, 423 U.S. 61, 62-63 n.2, 96 S.Ct. 241, 46 L.Ed.2d 195 (1975).

In ***Ratzlaf v. United States***, 510 U.S. ___, 114 S.Ct. 655, 126 L.Ed.2d 615 (1994), the Supreme Court added an additional element to the offense of structuring. ***Ratzlaf*** held that the government now had to prove that a defendant acted with the knowledge that the structuring he undertook was unlawful. The Court decided ***Ratzlaf*** on January 11, 1994 and **Packer** pled guilty exactly seven (7) months later on August 11, 1994. When **Packer** pled guilty, the Court's holding in

Ratzlaf that dealt with this issue was ***U.S. v. Oreira***, 29 F.3d 185 (5th Cir. 1994), decided on August 4, 1994, stating "The government must now also prove that a person, when structuring a currency transaction, knew that his conduct was unlawful." Id. At 188; accord ***U.S. v. Garza***, 42 F.3d 251 (5th Cir. 1994).

In ***McNally v. United States***, 483 U.S. 350, 107 S.Ct. 2875, 97 L.Ed.2d 292 (1987), the Supreme Court held that the term to defraud referred to depriving one of his percuniary or property interest by dishonest methods or schemes and the government interests could only be implicated through its interest as a property holder. In ***United States v. Yermian***, 468 U.S. 63, 73n.12, 104 S.Ct. 2936, 82 L.Ed.2d 53 (1984), (quoting ***U.S. v. Godwin***, 566 F.2d 975, 976 (5th Cir. 1978)), the Court distinguished the difference between deceit and fraud stating "Intent to deceive and intent to defraud are not synonymous. Deceive is to cause to believe the false or to mislead. Defraud is to deprive some right, interest or property by deceit." The mail fraud indictments, as drafted, could not have, by any reasonable construction, have charged an offense for which Petitioner pled guilty, because they made no allegations as to any percuniary or property interest; therefore, the conduct alleged clearly was not within the ambit of fraud as defined by this Court in ***McNally***; consequently, the indictments could not have fairly informed the defendant of the charge against him. "An indictment's most basic purpose - a fundamental objective that **must** be realized - is to fairly inform a defendant of the charge against him." ***U.S. v. Hagmann***, 950 F.2d 175, 182 (5th Cir. 1991).

Petitioner submits that 1) the failure of the structuring indictments to allege that he had a culpable mental state and 2) the failure of the mail fraud indictments to allege a specific intent to deprive the government of a pecuniary or property

interest resulted in defective indictments which must be dismissed.

This Court has delineated the elements of a sufficient indictment stating "An indictment is sufficient if it contains the elements of the offense charged, fairly informs the defendant what charge he must defend so that he may prepare a defense and enables the accused to plead acquittal or conviction in bar of future prosecution for the same offense. It is generally sufficient that an indictment set forth the offense in the words of the statute itself, as long as those words of themselves fully, directly and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished." ***Hamling v. United States***, 418 U.S. 87, 94 S.Ct. 2887, 2907, 41 L.Ed.2d 590, 620 (1974).

An indictment that tracks the words of the statute allegedly violated is generally sufficient, but where an essential element, as required by case law, is not alleged in the indictment, the indictment is fatally defective and must be dismissed. ***U.S. v. Lopez***, 2 F.3d 1342, 1368 (5th Cir. 1993); ***U.S. v. Gafyczk***, 847 F.2d 685, 688-689 (11th Cir. 1988).

If it is clear from the indictments and from the record of Petitioner's guilty plea hearing, that neither the court nor the government or Petitioner's own attorneys were aware of 1) the requirements to show a violation of the law of structuring as set forth by this Court seven **months** earlier in ***Ratzlaf*** or 2) the law of mail fraud as interpreted by this same Court seven **years** earlier in ***McNally***. The government drafted the indictments without carefully considering the relevant elements of the offenses. The missing elements can not be inferred from the charges. The indictments do not contain any factual averments that would fairly inform Petitioner of the

charges against him. As alleged in Petitioner's original Petition for Writ of Certiorari, the guilty pleas for these charges were constitutionally void, therefore, there was not a valid plea of guilty to which an appeal waiver could attach.

Petitioner believes that he is entitled to relief. Under circumstances similar to Petitioner's, this Court held in ***Davis v. United States***, 417 U.S. 333, 346, 94 S.Ct. 2298, 2305 41 L.Ed.2d 109 (1974), that when a defendant is convicted and punished for an act that the law does not make criminal, the principles of judicial finality are irrelevant. Reviewing the facts and case law set forth above, Petitioner's convictions and punishment for structuring and mail fraud are for acts that the law does not make criminal. There can be no room for doubt that such a circumstance inherently results in a complete miscarriage of justice and presents exceptional circumstances that justify relief. Id. At 346.

Packer was prejudiced by the fault indictments in that they did not inform him of what conduct constituted a criminal offense. Based upon this insufficient notice of what conduct constituted a crime, ***Packer*** pled guilty and was sentenced to prison even though neither his conduct nor the indictments upon which he relied in pleading guilty constituted a crime.

CONCLUSION

FOR THESE REASONS, Petitioner prays this Honorable Court will issue a Writ of Certiorari and review the opinion below.

Respectfully submitted,

Jodie Timothy Packer
Houston unit 21605-077
Federal Medical Center
3150 Horton Road
Fort Worth, TX 76119-5996

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES OF AMERICA	)	
	)	
VS.	)	CRIMINAL NO.
	)	_____
JODI TIMOTHY PACKER	)	

The Grand Jury Charges:

COUNT 1

On or about April 10, 1990, and continuing through on or about April 11, 1990, in the Dallas Division of the Northern District of Texas, **JODIE TIMOTHY PACKER,** Defendant, aided and abetted by others known and unknown, did knowingly, willfully and for the purpose of evading the reporting requirements of Title 31, United States Code, Section 5313(a), and the regulations promulgated thereunder, structure and assist in structuring a transaction with one or more domestic financial institutions, to wit: the Defendant cashed cashier's checks and personal checks in the following amounts at the following financial institutions and received the following amounts of currency:

DATE	TRANSACTIONS
04/10/90	Defendant, cashes a $25,000.00 cashier's check no. 2400054957 drawn on Bank One - Preston at Bank One - Market Center and receives $9,000.00 currency and purchases Cashier's check no. 1900014053 for $16,000.00 payable to JODI PACKER;

DATE	TRANSACTIONS
04/10/90	Defendant cashed a $16,000.00 cashier's check no. 1900014053 drawn on Bank One - Market Center at Hibernia Bank - Love Field, received $9,000.00 currency and purchased cashier's check no. 086649 for $7,000.00 payable to JODI PACKER;
04/10/90	Defendant cashed a $7,000.00 cashier's check no. 086649 drawn on Hibernia Bank - Love Field at Comerica Bank and received $7,000.00 currency;
04/10/90	Defendant cashed check no. 126 drawn on account number 0242050680 from Bank One - Preston at Bank One - Preston and received $8,500.00 currency;
04/11/90	Defendant cashed a $7,500.00 cashier's check no. 25293 drawn on Benchmark Bank at Benchmark Bank and received $7,500.00 currency.

In violation of Title 31, United States Code, Sections 5324(3) and 5322(a) and Title 18, United States Code, Section 2.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
McALLEN DIVISION

UNITED STATES OF AMERICA, Plaintiff	)	
vs.	)	CRIMINAL NO.
JODIE TIMOTHY PACKER, Defendant	)	

INDICTMENT

THE GRAND JURY CHARGES:

Count One

On or about May 5, 1994, in the Southern District of Texas and within the jurisdiction of the Court, Defendant

JODIE TIMOTHY PACKER

did knowingly and willfully and for the purpose of evading the reporting requirements of Title 31, United States Code, Section 5316 and the regulations promulgated thereunder, structure and assist in structuring the importation of monetary instruments, to wit: the defendant entered the United States from the Republic of Mexico with $13,388 in U.S. currency and $277 (U.S. value) in Mexican pesos and filed a Currency and Monetary Instruments Report, Form CF-4790), signing the name William Clayton Dunn instead of his true name.

[Violation: Title 31, United States Code, Section 5324(b)]

A TRUE BILL

/s/

FOREMAN

GAYNELLE GRIFFIN JONES
UNITED STATES ATTORNEY

/s/

ASSISTANT UNITED STATES ATTORNEY

COUNTS 4 & 5

Violations: 18 U.S.C. Section 1341 (Mail Form)

Penalty: A fine of not more than $1,000 per count and/or imprisonment of not more than 5 years per count; a period of supervised release of not more than 3 years; mandatory assessment of $50.00 per count

INTRODUCTION

1. On or about April 18, 1990, JOY DAVIS AYLOR was indicted, in cause number F90-01462-IL by a Grand Jury in Dallas County, Texas, for a state offense of Capital Murder.
2. On or about May 5, 1990, scheduled for a court appearance in connection with the above-mentioned cause, JOY DAVIS AYLOR failed to appear.
3. On or about May 8, 1990, a federal warrant was issued for the arrest of JOY DAVIS AYLOR for a violation of Title 18, United States Code, Section 1073 for the offense of Interstate or Foreign Flight to Avoid Prosecution.
4. On or about November 16, 1990, in Collin County, Texas, using false documents and identification, the Defendant, JODIE TIMOTHY PACKER applied for a United States passport in the name of a deceased relative, DONALD AVERILLE AIRHART.

5. The false identification used in Collin County, Texas by the said Defendant, JODIE TIMOTHY PACKER, on or about November 16, 1990, included a birth certificate pertaining to his deceased relative, DONALD AVERILLE AIRHART.

PURPOSE OF THE SCHEME AND ARTIFICE

From on or about July 30, 1990, and continuing to on or about November 16, 1990, the Defendant, JODIE TIMOTHY PACKER, devised and intended to devise a scheme and artifice to defraud the United States of and concerning his application for and the issuance of a United States passport in the name of a deceased individual, to-wit: DONALD AVERILLE AIRHART, in order that the Defendant might establish a fictitious identity and travel abroad under such identity.

THE SCHEME AND ARTIFICE

It was part of the scheme and artifice that the Defendant submit a written request for the County Clerk or to Deputy County Clerk of Jefferson County, Texas, for a certified copy of the birth certificate for DONALD AVERILLE AIRHART, deceased. After obtaining a certified copy of said birth certificate, it was part of the scheme and devise for the defendant, JODIE TIMOTHY PACKER, in Collin County, Texas, to present the certified copy of the said birth certificate, together with other identification documents, in support of his own application for a United States passport in the name of DONALD AVERILLE AIRHART

THE MAILINGS

COUNTS 4

On or about July 30, 1990, JODIE TIMOTHY PACKER, for the purpose of executing and attempting to execute the scheme and artifice, in the Eastern District of Texas, did place and cause to be placed in a post office and authorized depository for mail matter in Dallas, Texas, a letter requesting a certified copy of the birth certificate for DONALD A. AIRHART, addressed to the Jefferson County Clerk, P. O. Box 1151, Beaumont, Texas 77704, located in Jefferson County in the Eastern District of Texas, to be sent and delivered by the postal service;

All in violation of Title 18, United States Code, Section 1341.

COUNT 5

On or about August 1, 1990, in the Eastern District of Texas, the Defendant, JODIE TIMOTHY PACKER, for the purpose of executing and attempting to execute the aforesaid scheme and artifice did cause to be placed in the post office and authorized depository for mail matter in Beaumont, Texas, a matter or thing, to-wit: a certified copy of the birth certificate for DONALD AVERILLE AIRHART, in a letter addressed to DONALD A. AIRHART and DONALD AVERILLE AIRHART, 158 Enchanted Oaks Drive, Mabank, Texas, 75147, to be sent and delivered by the Postal Service;

All in violation of Title 18, United States Code, Section 1341.